THONG FOO CHING & ORS

v.

SHIGENORI ONO

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-783 OF 1995]
24 SEPTEMBER 1998

CONTRACT: *Illegality - Public policy - Sale and purchase of land - Agreement split into two separate agreements to avoid paying additional taxes and stamp duty - Whether against public policy - Whether null and void and unenforceable - Whether consideration thereof unlawful - Contracts Act 1950 s. 24(e) - Real Property Gains Tax Act 1976 s. 4, Part II of Schedule 5 - Stamp Act 1949*

CONTRACT: *Void contract - Restitution - Sale and purchase of land - Agreements void ab initio for being against public policy - Whether respondent entitled to refund of purchase price - Whether could revert to his status quo - Contracts Act 1950 s. 66*

CIVIL PROCEDURE: *Pleadings - Amendment of - Whether can be amended at any stage of the trial - Amendment in order to plead illegality - Whether court obliged to take notice of plea ex proprio motu*

EVIDENCE: *Parol evidence rule - Sections 91 & 92 Evidence Act 1950 - Sale and purchase of land - Written agreements - Existence of colateral oral agreement - Admissibility - Whether evidence of oral agreement properly admitted by trial judge - Evidence Act 1950, ss. 91, 92, provisoes thereto*

EVIDENCE: *Adverse inference - Section 114(g) Evidence Act 1950 - Applicability - Sale and purchase of land - Claim for refund of purchase price - End of plaintiff's case - Omission to adduce rebutting evidence - Whether amounted to withholding of unfavourable evidence*

The respondent, a Japanese national, had agreed to purchase two pieces of land ('the properties') belonging to T.C.C Holdings Sdn Bhd, the third appellant, for RM6.5 million. The third appellant was owned and controlled by the first and second appellants who were husband and wife. The parties were advised by their common solicitor ('PW2') that the transaction needed the approval of the Foreign Investment Committee ('the FIC'), in line with the Government's "Guidelines for the Regulations of Acquisition of Assets,

Mergers and Take-overs" ('the Guidelines') which forbade the acquisition of any property in Malaysia over RM5 million without such approval.

The parties were not inclined to abide by the directive in the Guidelines, as compliance thereof would incur additional payment of taxes and stamp duty to the Government. In consequence, upon legal advice, they circumvented the Guidelines and executed two separate agreements, *viz.* (i) a 'land sale agreement' whereby the respondent purchased the properties from the third appellant for RM4.9 million, and (ii) a 'share sale agreement' whereby the respondent bought over Windollars Sdn Bhd, a company owned and controlled by the first and second appellants, for RM1.6 million. It was not in dispute that by this arrangement, the Government had lost RM80,000 by way of real property gains tax and RM27,000 by way of stamp duty payable.

The respondent had completed the share sale agreement but could not complete the land sale agreement as one Golden Scoop Sdn Bhd, who claimed to have a tenancy agreement with the third appellant, had issued an interim injunction against the properties. The respondent alleged that the third appellant had been in breach of the land sale agreement, for not delivering vacant possession of the properties to him, and rescinded the said agreement on that ground. The respondent also maintained that by a tacit oral agreement that he had concluded with the appellants, the share sale agreement had become part and parcel of the land sale agreement, so that a breach of the latter would also determine the former. The respondent, in the event, sought to rescind the share sale agreement as well, and demanded the repayment of RM2,721,024 being moneys he had allegedly paid under the two agreements.

At the trial, the appellants denied that the two agreements were interlinked or were dependent on each other for their performance. They argued that there was nothing in the agreements that indicated such inter-dependency, and in any case, ss. 91 and 92 of the Evidence Act 1950 ('Act 56') applied as to defeat the respondent's contention that there was a collateral oral agreement between the parties. The appellants had also, during the pendency of the trial, obtained a court order to re-amend their pleadings, and consequently pleaded before the learned judge, for the first time, the issue of illegality. It was submitted, in essence, that the scheme of circumventing the Guidelines had contravened the provisions of the Real Property Gains Tax Act 1976 ('Act 169') and the Stamp Act 1949 ('Act 378'), resulting in the loss of revenue to the Government of Malaysia, and that being so, both agreements were contrary to public policy or tainted with illegality and were null and void and unenforceable. The facts also showed that at the close of the respondent's case, the appellants had taken the stand that the respondent had not proved his claims, and so elected not to adduce any rebutting evidence.

The learned judge, subscribing to the respondent's arguments, ruled that (i) the respondent had effectively revoked the two agreements (ii) the two agreements were dependent of each other and were validly executed, and the question of illegality did not arise by the mere execution of the two agreements separately (iii) by virtue of s. 57(2) of the Contracts Act 1950 ('Act 136'), there was no merit in the third appellant's defence that it could not perform the land sale agreement because of the injunction, and (iv) Section 114(g) of the Evidence Act 1950 ('Act 56') applied as the appellants had failed to call any witness to support their defence. The learned judge, in the circumstances, entered judgment for the respondent whereupon the appellants appealed. The main issues that arose were: (a) whether the respondent could enforce the two agreements given the situation that there had been an avoidance of the Guidelines resulting in the loss of revenue to the Government; (b) whether, if the agreements were void and unenforceable, the respondent could seek restitution and revert to his *status quo* under s. 66 of Act 136.

Held:

Per Siti Norma Yaakob JCA:

[1] Both the respondent and PW2 had testified that the parties had entered into the two agreements separately in order to circumvent the FIC requirement and that this intention was present throughout the transaction. PW2 had also alluded to the Memorandum of Understanding and the four letters that he had sent the third appellant, which together illustrated the intention of the parties that, should the sale of the properties fail the sale of the shares in Windollars would likewise fail. Bearing in mind these oral and documentary evidence, the learned trial judge was correct in admitting such evidence under s. 92(b) of Act 56 to establish the existence of an oral agreement alongside that of the two written agreements.

[2] There is no merit in the complaint that the defence of illegality had only been introduced at the trial, as pleadings can be amended at any stage of the trial provided the other party is not prejudiced by it. The amendments here were made pursuant to a court order and no appeal has been filed against that order. Applying the doctrine of relation back, the amendment must take effect on the day the original pleading was filed.

[2a] The illegality of an agreement sued upon, in any case, is a matter which the court is obliged to take notice of *ex proprio motu*, once it is apprised of facts tending to support the suggestion. No court would knowingly be party to the enforcement of an unlawful agreement.

[3] The Guidelines have no force of law and impose only a moral obligation on those affected to comply with their provisions. Consequently, non-compliance or avoidance of the Guidelines cannot render any agreement invalid or unenforceable. The learned trial judge was correct when she held that avoidance of the Guidelines in the manner that was done here cannot be held against the respondent as to render the two agreements invalid.

[3a] However, whilst the Guidelines have no effect on the scheme of avoidance practised by the parties, different consideration must apply when revenue is lost as a result of such scheme. In this case, PW2 had admitted that apart from the Guidelines the sale and purchase of the properties had attracted both Act 169 and Act 378. The court, in the circumstances, cannot countenance such a transaction, as the two agreements, if allowed to be enforced, would defeat Act 169 and Act 378 and therefore fall within the ambit of s. 24(b) of Act 136. The learned judge was thus in error in holding that the two agreements were validly executed.

[4] As the arrangement between the parties is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is *void ab initio* and the parties were outside the pale of the law. The respondent, being a party thereto, cannot claim any remedy under this arrangement. Even if the respondent had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned.

[4a] The appellants, however, are entitled to rely upon illegality in their defence in order to meet the respondent's claim. The reason why the law allows the appellants to do so is due to the general principle of public policy contained in the maxim *ex do lo malo non aritur actio.*

[5] The learned judge was in error when she invoked s. 114(g). Whilst it is true that the appellants had to prove the allegation of illegality, that became unnecessary when PW2 testified that by splitting the sale and purchase of the properties into two agreements, the Government had been unjustly deprived of large sums of money by way of real property gains tax and stamp duty payable and this makes the agreement void. Section 114(g) is irrelevant and the appellants' election not to lead any evidence cannot be held against them.

[5a] There is also no procedural requirement in the Rules of the High Court 1980 that a defendant must lead evidence at the end of the plaintiff's case. A defendant need only to adduce evidence when he considers that the evidence led by the plaintiff has established the plaintiff's claim on a balance of probability. In this case, since the appellants had taken the stand that the respondent had not proved his claims, they were entitled to consider that no rebuttal thereof was necessary. More so, when there was an admission by PW2 as to evasion of the relevant revenue laws. Clearly, the appellants' election not to lead any evidence was not withhholding of unfavourable evidence under s. 114(g) of Act 56.

[6] The two agreements were drawn by a common solicitor and not by the parties themselves. There was also evidence that PW2 had discussed the workings of Act 169 and Act 378 with the parties. PW2 must know that executing the two agreements the way it was done must lead to less tax and less stamp duty payable to the Government and this knowledge must be imputed to the respondent and the appellants. Under these circumstances, both the respondent and the appellants cannot say that they were not aware that their act of circumventing the Guidelines had contravened the relevant provisions of Acts 169 and 378. That being so, it is not open to the respondent to revert to his *status quo* under s. 66 of Act 136. The appeal must be allowed.

Per Ahmad Fairuz JCA

[1] The respondent knew that the two agreements constitued an attempt to evade paying higher taxes that were due to the Government. The arrangement that the respondent had entered into was adverse to public policy, and by virtue of s. 24(e) of the Contracts Act 1950, the consideration given therefor was also unlawful. Clearly, the agreements were void and unenforceable in law.

[2] What happened here had defeated and frustrated revenue laws, and on this ground, the agreements cannot also be enforced. The court, further, cannot knowingly be party to the enforcement of a void agreement.

[Appeal allowed; titles to properties to be returned to appellants.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden yang merupakan seorang warganegara Jepun, telah bersetuju untuk membeli dua bidang tanah ('hartanah') kepunyaan T.C.C. Holdings Sdn Bhd., perayu ketiga, bagi jumlah sebanyak RM6.5 juta. Perayu ketiga dimiliki dan dikuasai oleh perayu-perayu pertama dan kedua yang merupakan pasangan suami isteri. Pihak-pihak tersebut telah dinasihatkan oleh peguamcara bersama mereka ('PW2') bahawa transaksi itu memerlukan kelulusan Jawatankuasa

Pelaburan Asing ('FIC'), sejajar dengan "Garispanduan Peraturan-Peraturan Pemerolehan Aset-Aset, Percantuman dan Pengambilalihan" Kerajaan ('Garispanduan') yang mana melarang pemerolehan mana-mana hartanah di Malaysia melebihi RM5 juta tanpa kelulusan yang sedemikian.

Pihak-pihak tersebut tidak cenderong untuk mematuhi arahan dalam Garispanduan, kerana dengan mematuhinya mereka akan mengalami pembayaran cukai tambahan dan duti setem kepada Kerajaan. Akibatnya, atas nasihat guaman, mereka telah mengetepikan Garispanduan dan menyempurnakan dua perjanjian yang berasingan, iaitu (i) satu "perjanjian penjualan tanah" di mana responden telah membeli hartanah tersebut daripada perayu ketiga bagi jumlah sebanyak RM4.9 juta, dan (ii) satu "perjanjian penjualan saham" di mana responden telah membeli Windollars Sdn Bhd, sebuah syarikat yang dimiliki dan dikuasai oleh perayu-perayu pertama dan kedua, bagi jumlah sebanyak RM1.6 juta. Adalah tidak dipertikaikan bahawa dengan persetujuan ini, Kerajaan telah kerugian RM80,000 melalui cukai keuntungan harta tanah dan RM27,000 melalui duti setem yang kena dibayar.

Responden telah menyempurnakan perjanjian penjualan saham tetapi tidak dapat menyempurnakan perjanjian penjualan tanah kerana sebuah syarikat bernama Golden Scoop Sdn Bhd, yang menuntut mempunyai perjanjian sewaan dengan perayu ketiga, telah mengeluarkan satu injunksi interim terhadap hartanah-hartanah tersebut. Responden mendakwa bahawa perayu ketiga telah memungkiri perjanjian penjualan tanah kerana tidak menyerahkan milikan kosong hartanah-hartanah tersebut kepada beliau, dan membatalkan perjanjian tersebut atas alasan itu. Responden juga mengatakan bahawa melalui satu perjanjian lisan yang beliau meterai dengan perayu-perayu, perjanjian penjualan saham tersebut telah menjadi sebahagian dari perjanjian penjualan tanah, dan kemungkiran perjanjian yang terkemudian akan juga menentukan perjanjian yang terdahulu. Responden, dalam keadaan itu, berusaha untuk membatalkan perjanjian penjualan saham tersebut juga, dan menuntut pembayaran balik sebanyak RM2,721,024 yang merupakan wang yang didakwa telah dibayar oleh beliau dibawah kedua-dua perjanjian tersebut.

Di perbicaraan, perayu-perayu telah menafikan bahawa kedua-dua perjanjian tersebut berkait antara satu dan yang lain atau bergantung antara satu dan yang lain untuk perlaksaannya. Mereka berhujah bahawa tidak terdapat apa-apa dalam perjanjian tersebut yang menunjukkan sifat saling bergantung yang sedemikian, dan walau apa pun, s. 91 dan 92 Akta Keterangan 1950 ('Akta 56') terpakai untuk mematahkan penegasan responden bahawa terdapat satu perjanjian lisan kolateral antara mereka. Perayu-perayu telah juga, sementara menantikan perbicaraan, mendapatkan perintah mahkamah untuk meminda semula pliding mereka, dan akibatnya telah memplid di hadapan hakim yang bijaksana, untuk kali yang pertama, isu mengenai kepenyalahan undang-undang

(illegality). Adalah dihujahkan, secara pentingnya, bahawa rancangan untuk mematahkan Garispanduan telah melanggari peruntukan-peruntukan Akta Cukai Keuntungan Harta Tanah 1976 ('Akta 169') dan Akta Setem 1949 ('Akta 378'), yang mengakibatkan kerugian hasil kepada Kerajaan Malaysia dan oleh yang sedemikian, kedua-dua perjanjian adalah bertentangan dengan dasar awam atau tercemar dengan kepenyalahan undang-undang dan adalah batal dan tak sah serta tidak boleh dikuatkuasakan. Fakta-fakta juga menunjukkan bahawa di penutupan kes responden, perayu-perayu telah mengambil pendirian bahawa responden telah tidak membuktikan tuntutan beliau, dan oleh yang demikian telah memilih untuk tidak mengemukakan sebarang keterangan mematah.

Hakim yang bijaksana, dalam bersetuju kepada penghujahan-penghujahan responden, telah memutuskan bahawa (i) responden telah secara berkesannya membatalkan kedua-dua perjanjian tersebut (ii) kedua-dua perjanjian tersebut bergantung antara satu dengan yang lain dan telah disempurnakan dengan sah, dan persoalan kepenyalahan undang-undang tidak berbangkit hanya dengan penyempurnaan kedua-dua perjanjian tersebut secara berasingan (iii) menurut s. 57(2) Akta Kontrak 1950 ('Akta 136'), tidak terdapat sebarang merit pada pembelaan perayu ketiga bahawa ianya tidak dapat melaksanakan perjanjian penjualan tanah kerana injunksi, dan (iv) Seksyen 114(g) Akta Keterangan 1950 ('Akta 56') terpakai kerana perayu-perayu telah gagal untuk memanggil sebarang saksi untuk menyokong pembelaan mereka. Hakim yang bijaksana, dalam keadaan yang sedemikian, telah memasukkan penghakiman untuk responden di atas yang mana perayu-perayu telah merayu. Isu-isu utama yang berbangkit adalah: (a) Samada responden boleh menguatkuasakan kedua-dua perjanjian memandangkan situasi bahawa terdapat usaha untuk mengelakkan diri daripada Garispanduan yang mengakibatkan kehilangan hasil kepada Kerajaan; (b) samada, sekiranya perjanjian-perjanjian tersebut adalah batal dan tidak boleh dikuatkuasakan, responden boleh mendapatkan restitusi dan berpaling kepada *status quo* nya di bawah s. 66 Akta 136.

Diputuskan:

Oleh Siti Norma Yaakob HMR:

[1] Kedua-dua responden dan PW2 telah memberi keterangan bahawa pihak-pihak tersebut telah memasuki kedua-dua perjanjian itu secara berasingan dengan tujuan untuk mengelakkan diri dari kehendak FIC dan sesungguhnya niat ini terdapat sepanjang transaksi tersebut. PW2 telah juga menyentuh Memorandum Kesefahaman serta keempat-empat surat yang telah beliau kirimkan kepada perayu ketiga, yang mana bersama-sama menunjukkan niat pihak-pihak tersebut bahawa, sekiranya penjualan hartanah-hartanah tersebut gagal, penjualan saham-saham dalam Windollars akan juga gagal. Mengambilkira keterangan dokumentar serta

lisan ini, hakim perbicaraan telah bertindak dengan betul dalam menerima masuk keterangan yang sedemikian di bawah s. 92(b) Akta 56 untuk menentukan kewujudan suatu perjanjian lisan bersama-sama dengan kedua-dua perjanjian bertulis tersebut.

[2] Tiada merit dalam bantahan bahawa pembelaan mengenai kepenyalahan undang-undang hanya diperkatakan sewaktu perbicaraan, kerana pliding-pliding boleh dipinda di mana-mana peringkat perbicaraan jika pihak yang lain itu tidak dimudaratkan. Pindaan-pindaan di sini telah dibuat selaras dengan perintah mahkamah dan tiada rayuan telah difailkan terhadap perintah itu. Menerima pakai doktrin 'relation back', pindaan tersebut semestinya berkuatkuasa pada hari pliding asal difailkan.

[2a] Kepenyalahan undang-undang atau ketidak-esahan sesuatu perjanjian yang didakwa, walau apa pun, merupakan satu perkara yang wajib diberi perhatian oleh mahkamah *ex proprio motu*, sebaik sahaja ianya menyedari fakta-fakta yang menyokong saranan tersebut. Tiada mahkamah dengan sengaja akan menjadi satu pihak kepada penguatkuasaan sesuatu perjanjian yang tidak sah di sisi undang-undang.

[3] Garisanpanduan disini tidak mempunyai kuasa undang-undang dan hanya mengenakan kewajipan moral ke atas mereka yang terjejas olehnya untuk mematuhi peruntukan-peruntukannya. Yang demikian, ketidak-patuhan atau usaha untuk mengelak dari Garispanduan itu tidak boleh menjadikan mana-mana perjanjian tak sah atau tidak boleh dikuatkuasakan. Hakim perbicaraan yang bijaksana bertindak dengan betul apabila beliau memutuskan bahawa pengelakkan dari Garispanduan tersebut dengan cara yang telah dilakukan di sini tidak boleh diputuskan sebagai menjadikan kedua-dua perjanjian tersebut tak sah.

[3a] Walaubagaimanapun, sementara Garispanduan itu tidak mempunyai kesan ke atas rancangan untuk mengelakkannya yang diamalkan oleh pihak-pihak tersebut, pertimbangan lain harus dipakai apabila hilangnya hasil akibat perancangan yang sedemikian. Dalam kes ini, PW2 telah mengakui bahawa selain daripada Garispanduan jualan serta pembelian hartanah-hartanah tersebut telah menarik perhatian kedua-duanya Akta 169 dan juga Akta 378. Mahkamah, dalam keadaan yang sedemikian, tidak boleh menyokong transaksi yang sedemikian, kerana kedua-dua perjanjian tersebut, jika dibenarkan untuk dikuatkuasakan, akan mematahkan Akta 169 dan Akta 378 dan dengan itu terlingkung dalam lingkungan s. 24(b) Akta 136. Hakim yang bijaksana adalah dengan itu salah dalam memutuskan bahawa kedua-dua perjanjian tersebut telah disempurnakan dengan sah.

[4] Oleh kerana persetujuan antara pihak-pihak tersebut adalah tidak sah di sisi undang-undang dan kepenyalahan undang-undang yang wujud bukan sahaja berhubung dengan perlaksanaannya tetapi pada permulaannya lagi, persetujuan yang sedemikian adalah *void ab initio* dan pihak-pihak berkenaan adalah berada diluar batasan undang-undang. Responden, yang merupakan satu pihak kepadanya, tidak boleh menuntut sebarang remedi di bawah persetujuan ini. Walaupun responden tidak mempunyai sebarang pengetahuan mengenai kepenyalahan undang-undang tersebut, oleh kerana persetujuan di sini tidak sah secara nyata dan intrinsiknya, ketidakbersalahannya itu tidak dimaafkan oleh undang-undang sejauhmana ianya berkaitan dengan akibatnya.

[4a] Perayu-perayu, walaubagaimanapun, berhak untuk bergantung pada kepenyalahan undang-undang bagi memenuhi tuntutan responden. Alasan mengapa undang-undang membenarkan perayu untuk melakukan sedemikian adalah kerana prinsip am kepentingan awam yang terkandung di dalam maxim *ex do lo malo non aritur actio.*

[5] Hakim yang bijaksana tersalah pertimbangan ketika beliau menggunakan s. 114(g). Sementara ianya benar bahawa perayu-perayu terpaksa membuktikan dakwaan kepenyalahan undang-undang, ianya menjadi tidak perlu apabila PW2 memberi keterangan bahawa dengan memecahkan penjualan dan pembelian hartanah tersebut kepada dua perjanjian, Kerajaan telah dilucuthak secara tidak adil akan satu jumlah wang yang banyak melalui cukai keuntungan harta tanah dan duti setem yang kena dibayar dan ini menjadikan perjanjian itu batal. Seksyen 114(g) adalah tak relevan dan pilihan perayu-perayu untuk tidak mengemukakan keterangan tidak boleh diputuskan dengan cara yang memudaratkan mereka.

[5a] Tidak juga terdapat kehendak prosedur dalam Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa defendan semestinya mengemukakan keterangan di penghujung kes plaintif. Defendan hanya perlu mengemukakan keterangan jika ia merasa bahawa keterangan yang dibawa oleh plaintif telah membuktikan tuntutan plaintif atas imbangan kebarangkalian. Dalam kes ini, oleh kerana perayu-perayu telah mengambil pendirian bahawa responden telah tidak membuktikan tuntutannya, mereka berhak untuk menimbang bahawa pematahannya tidak perlu. Lebih-lebih lagi, tatkala terdapatnya pengakuan oleh PW2 berhubung dengan usaha untuk mengelak dari undang-undang hasil yang relevan. Jelasnya pilihan perayu untuk tidak mengemukakan sebarang keterangan bukannya merupakan suatu penahanan keterangan yang tidak wajar di bawah s. 114(g) Akta 56.

[6] Kedua-dua perjanjian telah disediakan oleh peguamcara yang sama dan bukannnya oleh pihak-pihak itu sendiri. Terdapat juga keterangan bahawa PW2 telah membincangkan tentang kepenggunaan Akta 169 dan Akta 378 dengan pihak-pihak tersebut. PW2 semestinya mengetahui bahawa menyempurnakan kedua-dua perjanjian menurut cara yang dilakukan disini semestinya membawa kepada cukai dan duti setem yang berkurangan kepada Kerajaan dan pengetahuan ini semestinya dikaitkan kepada responden dan perayu-perayu. Di bawah keadaan-keadaan ini, kedua-duanya responden dan perayu-perayu tidak boleh mengatakan bahawa mereka tidak mengetahui bahawa perbuatan mereka untuk mengelak dari Garispanduan itu telah melanggari peruntukan-peruntukan relevan Akta 169 dan 378. Oleh yang demikian, ianya tidak terbuka kepada responden untuk berpaling kepada status quonya di bawah s. 66 Akta 36. Rayuan ini semestinya dibenarkan.

Oleh Ahmad Fairuz HMR:

[1] Responden mengetahui bahawa kedua-dua perjanjian itu merupakan satu percubaan untuk mengelak daripada membayar cukai yang lebih tinggi yang kena dibayar kepada Kerajaan. Persetujuan yang responden telah meterai adalah bertentangan dengan kepentingan awam, dan menurut s. 24(e) Akta Kontrak 1950, balasan yang diberikan adalah dengan itu tidak sah di sisi undang-undang. Jelasnya, perjanjian-perjanjian tersebut adalah tidak sah dan tidak boleh dikuatkuasakan di sisi undang-undang.

[2] Apa yang berlaku telah mengalahkan dan menghalang undang-undang hasil, dan atas alasan ini, perjanjian-perjanjian tersebut tidak boleh dikuatkuasakan. Mahkamah selanjutnya tidak boleh, dengan pengetahuan, menjadi satu pihak kepada penguatkuasaan sesuatu perjanjian yang batal.

[Rayuan dibenarkan; hakmilik kepada hartanah dikembalikan kepada perayu-perayu.]

Cases referred to:

Ahmad Udoh & Anor v. Ng Aik Chong [1970] 1 MLJ 82 ***(dist)***
CB-Trak Sdn Bhd v. Bingkal Timber Agencies Sdn Bhd [1989] 1 MLJ 124 ***(foll)***
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157 ***(refd)***
David Hey v. New Kok Ann Realty Sdn Bhd [1985] 1 MLJ 15 ***(refd)***
Dixon v. Winch [1900] 1 Ch 736 ***(foll)***
Harun Taib v. Khor Peng Song [1991] 3 CLJ 2484 ***(foll)***
Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors [1979] 2 MLJ 224 ***(refd)***
Keng Huat Film Co Sdn Bhd v. Makhanlall Pte Ltd [1983] 2 CLJ 187 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897 ***(foll)***
Malaysia Overseas Investment Corp Sdn Bhd v. Sri Segambut Supermarket Sdn Bhd [1986] 2 MLJ 382 ***(refd)***

Miller v. Karlinski [1945] (62) TLR 85 ***(foll)***
Mustafa Osman v. Lee Chua & Anor [1996] 3 CLJ 494 ***(refd)***
Ong Kee Hui v. Sinyium Anak Mutit [1983] 1 MLJ 36 ***(refd)***
Overseas Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor [1989] 1 CLJ 458 ***(foll)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(dist)***

Legislation referred to:
Borrowing Companies Act 1969, s. 3
Contracts Act 1950, ss. 24(b), (e), 57(2), 66
Contracts (Malay States) Ordinance 1950, s. 66
Evidence Act 1950, ss. 91, 92(b), 114(g)
Padi Cultivators Ordinance 1965, s. 3(1)
Real Property Gains Tax Act 1976, s. 4
Rules of the High Court 1980, O. 35 rr. 4(3), (4)

[Appeal from High Court, Kuala Lumpur; Suit No: S7-22-189-1990]

For the appellants - TJ Su (Christie Soosay Nathan & Richard WG Lee with him); M/s Cheah Teh & Su
For the respondent - Wong Chong Wah (Lee Hock Beng with him); M/s HB Lee & Co

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

I have had the opportunity of reading in draft both the judgments of Siti Norma Yaakob JCA and Ahmad Fairuz bin Dato' Sheikh Abd Halim JCA and I concur with their conclusions that the appeal be allowed with costs, however, I associate myself with the comprehensive judgment of Siti Norma Yaakob JCA.

Siti Norma Yaakob JCA:

This appeal had been allowed with costs and I now give the reasons how that decision was arrived at.

In 1990, the respondent, a Japanese national and the plaintiff in the court below, came to this country to seek his fortune. He invested in the property market and for this purpose he entered into two sale and purchase agreements both dated 19 January 1990.

The first (the land sale agreement) was with the third appellant, a company owned and controlled by the first and second appellants who are husband and wife. As the registered proprietor of two adjoining pieces of land in Jalan Bukit Bintang, Kuala Lumpur, the third appellant who was also the third defendant in the court below, agreed to sell the properties together with a double-storey shophouse erected thereon, free from encumbrances and with vacant possession,

to the respondent, for a consideration of RM4.9 million. As at the date of the agreement, the properties were charged to MUI Bank Berhad and that the respondent had every intention to replace the shophouse on the properties with a multi-storey office block.

The second agreement (the share sale agreement) was also executed by the respondent, this time with the first and second appellants, the directors and the registered shareholders of all the issued shares in the third appellant and the first and second defendants in the court below. Under the terms of the share sale agreement, the first and second appellants agreed to sell their entire shareholding, which is made up of two issued and paid up shares, in a company called Windollars Sdn. Bhd., to the respondent for a consideration of RM1.6 million. This is in fact a takeover of Windollars by the respondent.

Transactions relating to the share sale agreement have already been completed and it is not disputed that the first and second appellants have already received the purchase price of the shares in full and all documentation pertaining to the transfer of the shares and all books and relevant documents relating to Windollars have been executed and deposited with the respondent's solicitors.

What has become a bone of contention between the parties is the non-performance of the land sale agreement. Under cl. 1, the respondent paid RM980,000 to the third appellant as deposit and earnest money. He had under cl. 2(i), three months from the date of the agreement ie, on or before 18 April 1990 (the completion date) within which to pay the balance of the purchase price of RM3,920,000 after which, vacant possession of the properties was to have been delivered by the third appellant. In fact a sum of RM141,024 was paid by the respondent towards the balance of the purchase price but he avers that such payment was mistakenly made.

On 12 March 1990 just about one month before the completion date, in proceedings emanating from Kuala Lumpur High Court CS. No. S6-22-102-90, one Golden Scoop Sdn. Bhd., obtained an interim injunction restraining the third appellant from dealing with the properties in whatsoever manner on the ground that it had a three year tenancy agreement with the third appellant. The interim injunction was removed by the High Court but subsequently restored by the Supreme Court on appeal on 5 June 1990.

The presence of this injunction and the existence of a tenancy agreement forced the respondent to end his contractual relationship with the appellants and by his solicitors' letter dated 10 April 1990, he rescinded the land sale agreement on the ground of the third appellant's obvious breach for not being able to deliver vacant possession of the properties free from encumbrances. There was also an added reason given that he had discovered the presence of a development order over the properties issued by the Dewan Bandaraya Kuala

Lumpur (DBKL) on 25 November 1988, renewable from year to year and a a decontrol order also issued by DBKL on 18 April 1989. The effect of these two orders was that all tenants occupying the rent controlled shophouse had to vacate the demised premises (which they did on 31 October 1989) on payment of compensation to enable the properties to be developed and construction of any new building on the properties had to commence on or before 30 April 1990. The respondent alleges that these two orders were not disclosed to him during negotiations for the purchase of the properties.

In view of the anticipatory breach of the land sale agreement and the omission to disclose the presence of the development and decontrol orders, the respondent rescinded not only the land sale agreement but the share sale agreement as well and demanded the repayment of all moneys he had made under the two agreements totalling RM2,721,024 and other damages suffered, within seven days. When no such payment was received, the respondent filed CS. No. S7-22-189-90 against all three appellants on 18 April 1990, which coincidentally was the completion date. It is interesting to note that although the alleged breaches relate to the land sale agreement, rescission of the share sale agreement was also pleaded and prayed for as the respondent has taken the stand that there was a tacit oral agreement reached with the first appellant who also spoke on behalf of the other two appellants as well that the share sale agreement was very much part and parcel of the land sale agreement and that a breach of any term in the latter would determine the former as well. Alternatively the respondent contends that there is an implied term that the share sale agreement is subject to the land sale agreement and that it would determine if the land sale agreement should be terminated by reason of any default on the part of the third appellant.

In his civil suit, the respondent pleaded the following causes of action:

(1) Breach of the land sale agreement on the part of the third appellant which determined both the land and share sale agreements.

(2) Further or alternatively the land sale agreement had been frustrated by the presence of the injunction obtained by Golden Scoop.

(3) Further or alternatively misrepresentation on the part of the first and second appellants for failing to disclose the presence of the development order and the tenancy arrangements which Golden Scoop purportedly had with the third appellant.

Based on the aforesaid causes of action, the respondent pleaded the following prayers:

(1) A declaration that he had effectively rescinded both agreements.

(2) An order that the first and second appellants repay the sum of RM2,721,024 being the monies paid under the two agreements and two heads of special damages described as items (2) and (3) in para. 10 of his amended statement of claim together with interests at such rate and for such period as is deemed fit and just.

(3) Alternatively an order against the third appellant that it repays the sum of RM1,121,024 paid under the land sale agreement together with the special damages specified in (2) above.

All three appellants deny that they had breached the land sale agreement, or that the injunction was a frustrating event or that they had made any misrepresentation to the respondent. The third appellant whilst accepting the respondent's repudiation of the land sale agreement has also averred such repudiation to be wrongful as it had lost the benefit of receiving payment of the balance of the purchase price of the properties and counter claims this loss and other damages suffered, from the respondent's refusal to fulfill his obligations under the agreement. For this counter claim, the third appellant asks for the following principal prayers:

(1) A declaration that the respondent had wrongly repudiated the land sale agreement.

(2) Damages to be assessed as a consequence of the respondent's refusal to perform the land sale agreement.

(3) A declaration that it is entitled to forfeit the deposit of RM980,00 paid under the land sale agreement.

At the trial, the learned trial Judge made the following findings:

(1) The third appellant had breached the land sale agreement and this entitles the respondent to rescind the agreement.

(2) The third appellant's defence that it was prevented from performing its part of the land sale agreement because of the presence of the injunction cannot be accepted by virtue of s. 57(2) of the Contracts Act 1950 (Act 136).

(3) Particulars of misrepresentation relied upon by the respondent have been proven against the first and second appellants.

(4) Section 114(g) of the Evidence Act 1950 (Act 56) applies as the appellants had failed to call any witness to support their defence.

(5) The two agreements are dependant of each other, they have been validly executed and the question of illegality does not arise by the mere execution of the two agreements separately.

(6) The respondent had validly rescinded the land sale agreement by virtue of the third appellant's breach in its inability to deliver vacant possession free from encumbrances by virtue of the injunction and the tenancy agreement Golden Scoop had with the third appellant.

Based on the above findings, the learned trial judge entered judgment for the respondent as follows:

(1) The first and the second appellants are to pay RM2,806,024 and the third appellant RM1,206,024 to the respondent.

(2) Interest of 8% per annum on the judgment sums from date or dates such payments were made by the respondent to date of realisation.

(3) The third appellant's counter claim is dismissed with costs.

(4) Costs of the whole suit be paid by the appellants to the respondent.

Before us, the first issue taken was whether the two agreements are interlinked and dependent on each other for their performance as pleaded by the respondent. The appellants say that they are not, as there is no express provision in either agreement to say so and in any event the provisions of ss. 91 and 92 of Act 56 apply as to defeat the respondent's contention that there was a collateral oral agreement between him and the appellants that the two agreements was very much part of one transaction and that the determination of the land sale agreement also determined the share sale agreement as well.

The learned trial judge after hearing the respondent and his two witnesses made the following remarks and concluded the two agreements to be interdependent.

> On the submission by learned counsel for the Defendants that sections 91 and 92 of Contracts Act prohibit evidence of any oral agreement which vary or change the terms of a written agreement from being adduced, with respect, I am of the view that in this case the Plaintiff is not relying on the oral agreement to construe, vary and/or interpret the clauses in the Land Sale Agreement and the Share Sale Agreement. Instead the Plaintiff is in fact relying on the evidence of PW1, PW2 and PW3, the Memorandum of Understanding and various letters written by the common solicitors to the Third Defendant dated 28th February, 6th, 15th and 28th March 1990, to show that the parties orally agreed and expressed an intention to treat the two Agreements as interdependent.

My understanding of the aforesaid remarks leaves me with the distinct impression that the learned trial judge was confused as to the applicability of ss. 91 and 92 of Act 56 and not Act 136 as stated therein. To begin with, s. 91 provides that the contents of a document must be proved by the document itself and s. 92 of the same Act provides that subject to six provisoes, no evidence of any oral agreement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from, its terms. The underlying reasoning for this well established principle of law is expressed clearly by Mohamed Azmi, FJ in the case of *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte. Ltd.* [1983] 2 CLJ 187; [1984] 1 MLJ 243, to be as follows:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissable. As against this, evidence of surrounding circumstances and factual background have always been admissable.

The respondent had maintained all along that the two agreements related to one transaction and were dependent on each other for their performance and relied on one of the provisoes to s. 92 to say that there was an oral agreement made by him with the first appellant to that effect and that the determination of one agreement determined the other as well. As proof of this oral agreement, the respondent relied on his own evidence, that given by his two witnesses, PW2 and PW3 and the documentary evidence in the form of the unsigned memorandum of understanding and the correspondence written by their common solicitors. To say that the respondent "is **not** relying on the oral agreement to construe, vary or interpret the clauses" (emphasis is mine), in the two agreements but instead relying on the oral and documentary evidence adduced at the trial as held by the learned trial judge, is I consider, a contradiction in terms. What the learned trial judge should have stated was that she had directed her mind as to whether the oral and documentary evidence led by the respondent was admissable under any of the provisoes to s. 92 and after having done so to conclude that the two agreements were interlinked and interdependent. The fact that she had found the two agreements to be so can only mean that she did just that and had found the oral and documentary evidence to be admissible under the particular proviso to s. 92 and accepted such evidence as proof of the parties' intention to treat both agreements as part of a single transaction with each depending on the other for their performance. Lest the mode of expression and the unfortunate choice of words give the written judgment a somewhat confusing impression, I hasten to make the necessary correction as to give effect of what perhaps was in the mind of the learned trial judge when she tried the action.

In that event the next issue to consider is whether the learned trial Judge was correct in so finding. Before I embark on this exercise, I need to identify the particular proviso to s. 92 that is applicable as the written judgment is silent on this point. On the facts of this appeal, I consider proviso (b) to be most appropriate as what the oral agreement seeks to do is to supplement what the two agreements lack and that proviso reads as follows:

> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that –
>
> (a) ...
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

The respondent, PW1 testified that when the price of the properties was agreed at RM6.5 million, he was advised by his solicitor, Mr. C.C. Choo, PW2, that he, the respondent, needed to obtain the prior approval of the Foreign Investment Committee (FIC) of the Economic Planning Unit of the Prime Minister's Department to purchase the properties. This is so as the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs" (the Guidelines) issued by the Government of Malaysia in 1974 forbid the acquisition of any assets or property in Malaysia over RM5 million in value without first obtaining FIC approval. It was to circumvent this FIC requirement that the two agreements were executed and he had no intention whatsoever to purchase Windollars as it had no value at all. When cross-examined on this, he made the following statement:

> I still say the actual value of the land is RM6.5 million. Despite that I had signed an agreement for RM4.9 million. The purpose to sign that agreement is to get around the FIC requirement. That was what I was told. This was what Mr. CC Choo informed me. This troubled my mind, so I asked Mr Choo many times. He said legally, it was alright and there was no problem at all.

Mr. C.C. Choo, the parties' common solicitor, PW2, confirmed such arrangements when he testified that on 11 January 1990, when he met the respondent and the first appellant at the latter's office, they discussed about the sale and purchase of the properties and the price was agreed at RM6.5 million. He then proceeded to give the following evidence.

> In the course of discussion the issue of FIC came up again. We discussed about to circumvent the FIC issue. It was proposed that Mr. Thong would sell one of his companies ...
>
> The primary concern was the 5 million ceiling. So we agreed to reduce the price of the two landed properties to RM4.9 million and the sale of the shares of company at 1.6 million.
>
> Of course, I tried my best to explain to Mr Ono about the necessity to separate into two agreements. I explained in English. He agreed to it as I was acting as his solicitor.
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> ...
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> In other words, the two Agreements were the means to achieve the purpose of the purchase. The method was explained to Mr Ono and Mr. Thong. They agreed to it.

To further support that same contention, PW2 then related the circumstances leading to the preparation of the unsigned memorandum of understanding in early March 1990, two months after the two agreements were executed. Clause 2 of the memorandum sets out the clear intention of the parties as to the status of the two agreements, their relationship to each other and the effect one had on the other. It is also PW2's evidence that the same intention had been present throughout the transaction and this is supported by four of his letters addressed to the third appellant. For ease of reference I quote the relevant portions of three of such letters.

The first, dated 28 February 1990, contains the following statement at para. 5.

> 5. We refer to the parties' agreement to execute a Memorandum of Understanding to bind both parties with regards to the sale and purchase of the two (2) subject properties, and the sale and purchase of the two (2) shares in Windollars Sdn. Bhd. We shall shortly forward to you the Memorandum of Understanding for your due approval and execution.

This was followed by PW2 forwarding a copy of the draft memorandum to the third appellant for its approval.

The second, dated 15 March 1990 contains the following two pertinent paragraphs.

> We refer to the meeting held at your office between your Mr. Thong, Mr. Ono, Ms. Koyama, Ms. Evelyn and our Mr. Choo on the 9-3-1990.
>
> In the said meeting, your Mr. Thong said that you would to seek advice from Mr. Michael Soo of M/s Shearn Delamore on the draft Memorandum of Understanding. And after that you would revert to our Mr. Choo by Tuesday, the 13-3-1990.

Lastly the third, dated 28 March 1990 when making reference to the second letter also went further to state as follows:

> Under our said letter dated 15-3-1990, we requested that you to inform us on your Solicitor's view on the draft memorandum. We have as of todate, yet to receive any response from your Solicitors. We would put it on record that notwithstanding the Memorandum has not been duly executed, it has always been the expressed intention of the parties that should the sale of the subject-properties fail by reasons of your neglect or default, the sale of the shares in Windollars Sdn Bhd will also fail and you are to refund the purchase price for purchase of the said shares in Windollars Sdn Bhd to the Purchase-Client.

Based on the oral and documentary evidence that I have highlighted above, I consider that the learned trial judge made the correct finding when she admitted such evidence under s. 92(b) of Act 56 to establish the existence of an oral agreement alongside that of the two written agreements.

The fact that the memorandum was not signed by either the appellants or the respondent makes no difference to such a finding as the act of preparing such a document is conduct consistent with the intention that the two agreements should contain more than what had been expressed and it is this intention that is indicative of the existence of an oral arrangement as opposed to a written one. In any event if the memorandum had been executed, it would expose the parties to the need to comply with the guidelines to obtain the FIC approval, the very course of action that they had planned to circumvent from the very beginning of their negotiations in the sale and purchase of the properties. So it makes sense that the memorandum remained unsigned and unexecuted.

Under such circumstances, can the two agreements be enforced by the respondent given the situation that there had been an avoidance of the guidelines resulting in the loss of revenue?

In this respect, Mr. C.H. Wong, learned counsel for the respondent argued that the guidelines have no force of law nor can they avoid an agreement. In any event the parties never intended to violate any written law as their primary concern was to circumvent the guidelines and the defence of illegality was only raised for the first time during the trial when the appellants filed a joint reamended statement of defence and the third appellant, a counter claim. It is Mr. Wong's submission that the defence of illegality was an afterthought and was never in the minds of the parties when they entered into the transaction.

My response to the introduction of the defence of illegality at the trial is that pleadings can be amended at any stage of the proceedings provided the other party is not prejudiced by it. In this instance, the amendments were made pursuant to an order of court dated 4 April 1995, and there is no appeal against

that order and under the doctrine of relation back an amendment takes effect on the day the original pleading was filed. Moreover as the defence is that of illegality my attention was drawn to the Privy Council case of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 MLJ 457 where it held "that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is apprised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see eg *Edler v. Auerbach*) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement."

See also the decision of this court in *Mustafa bin Osman v. Lee Chua & Anor* [1996] 3 CLJ 494; [1996] 2 MLJ 141.

In their reamended pleadings, the appellants allege that the scheme of circumventing the guidelines is a clear contravention of the provisions of the Real Property Gains Tax 1976 (Act 169) and the Stamp Act 1949 (Act 378), resulting in the loss of revenue to the government of Malaysia and as such both agreements are contrary to public policy or tainted with illegality and are null, void and unenforceable.

The guidelines have been the subject of comments in a number of cases and the first of these is the case of *Ho Kok Cheong Sdn. Bhd. & Anor. v. Lim Kay Tiong & Ors.* [1979] 2 MLJ 224 where Wan Hamzah J (as he then was) described the guidelines to be as follows:

> The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law but are of advisory character merely. I do not think that non-compliance with the guidelines can be taken as an act opposed to public policy. The guidelines reflect the government's political policy but government's political policy is not public policy.

The Federal Court, five years later, appears to attach more significance to the guidelines in the case of *David Hey v. New Kok Ann Realty Sdn. Bhd.* [1985] 1 MLJ 15 as gleaned from the following statement:

> We have studied the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs", a document which was referred to by the learned trial judge in his notes of proceedings. It would seem to us that it is more than mere political policy, reflecting as it does a national economic policy, the New Economic Policy of which we could properly take judicial notice. Non-compliance with the requirements of the "Guidelines" can obviously have adverse consequences especially to a private company such as the respondent company, so that the exercise of the discretion by its directors in refusing to rectify the register is we think, in the circumstances something the learned trial judge rightly declined from interfering with.

In *David Hey*, the appellant sought to rectify the register of members of the respondent company by striking out the name of First Nominees (Pte) Ltd and to substitute his name as the holder of 10,000 shares in the company. The 10,000 shares represented 37.04% of the total issued capital of the company and prior approval of FIC was required where there is an acquisition of 15% or more of the voting rights of any Malaysian company whether by a Malaysian or a non-Malaysian. The appellant had not obtained such approval and the directors took this into account and exercised their discretion not to rectify. Both the High Court and the Federal Court confirmed that decision to have been correctly made.

I had, a year later, in the case of *Malaysia Overseas Investment Corporation Sdn. Bhd. v. Sri Segambut Supermarket Sdn. Bhd.* [1986] 2 MLJ 382, ruled the guidelines to have "no force of law but of advisory character only and non-compliance whatsoever will have no effect as to the legality or otherwise of the contract.

In *Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors.* [1989] 1 CLJ 157; [1989] 1 MLJ 426, the plaintiffs argued that the guidelines should be rigidly and strictly construed in the manner of a penal statute, but since there was no contravention of the guidelines, Shankar J (as he then was) declined to decide what the consequences might have been if in fact there was a contravention. As such this case is no help.

A reading of the guidelines shows that there is no penalty imposed for non-compliance of any of their provisions. From the very nature of the document itself, and its purpose to eradicate poverty by restructing the Malaysian society so as to correct any racial economic imbalance, at most I would say the guidelines impose a moral obligation only on those effected to comply with their provisions. In this respect I agree with Mr. Wong that non-compliance or avoidance of the guidelines cannot render any agreement to be invalid or unenforceable. At most, non-compliance can be used as a means of refusing to exercise a discretion, a purely administrative act, as was done by the directors in the *David Hey's* case. On the facts of the appeal before us, I consider that the learned trial judge was correct when she held that avoidance of the guidelines in the manner that was done in this case cannot be held against the respondent as to render the two agreements invalid.

Whilst the guidelines have no effect on the scheme of avoidance as practised by the parties in this case, does the same apply when revenue is lost as a result of such a scheme?

PW2 testified that the third appellant had acquired the properties on 3 October 1985. So when they were sold to the respondent in early 1990, that sale transaction occured during the fifth year of acquisition and as such attracted 5% tax under s. 4 read together with Part 11 of Schedule 5 of Act 169. However with the reduction in the purchase price of the properties, PW2 admitted that the government of Malaysia lost RM80,000 by way of real property gains tax and RM27,200 by way of stamp duty payable and it is these losses in revenue that the appellants maintained had tainted the whole transaction with illegality.

By way of rebuttal, the respondent contended that he and the appellants never intended to infringe Act 169 or Act 378 as their primary concern was to circumvent the guidelines only and to proceed with the sale and purchase of the properties and Windollars quickly without the bother of getting FIC approvals. In any event the real property gains tax was payable by the vendor, the third appellant, and for the appellants to complain that the respondent was all out to cheat the revenue seems a rather perpelexing contention.

My views on this contention are that the respondent may never have intended to avoid any statute but the consequence of his action has the same effect as the very intention that he never had. As such it matters not that it was the third appellant who should have paid the full property gains tax had the properties been sold at their true value of RM6.5 million. The respondent was very much a party to the scheme and in this respect both the respondent and the third appellant were represented by a common solicitor, PW2, a person with 11 years standing at the Bar, seven years of which was concerned mainly with a banking and conveyancing work. On his own admission, PW2 was all too aware that apart from the guidelines the sale and purchase of the properties attracted both Act 169 and Act 378.

Under these circumstances can the court countenance such a transaction? I say "no" as the two agreements, if allowed to be enforced, would defeat Acts 169 and 378 and therefore fall within the ambit of s. 24(b) of Act 136 which states as follows:

> 24. The consideration or object of any agreement is lawful, unless
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> (a) ...
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> (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) ...
>
> (d) ...
>
> (e) ...

> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The legal effect of this arrangement is best summed up by the Federal Court in the case of *Datuk Ong Kee Hui v. Sinyium Anak Mutit* [1983] 1 MLJ 36 in the following manner:

> As the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore void *ab initio* and the parties are outside the pale of the law. The respondent being a party thereto cannot claim any remedy under this arrangement. He is not entitled to the refund of the balance of his remuneration kept by the party, nor could he claim any damages, special or general, in connection with his forced resignation: *ex turpi causa non oritur actio*. Even if he had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. *Waugh v. Morris* [1873] LR 8 QB 202, *J.M. Allan (Merchandising) Ltd. v. Cloke & Anor* [1963] 2 QB 340. On the other hand the appellant is entitled to rely upon illegality in his defence in order to meet the respondent's claim. The reason why the law allows the appellant to do so, as explained by Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp. 341, 343; 98 ER 1120, 1121 is due to the general principle of public policy contained in the maxim *ex dolo malo non aritur actio.* The court will not assist a person to pursue his claim if it arises *ex turpis* and when the defendant is equally at fault the court will apply the maxim *potior est conditio defendentis*. The learned trial judge therefore should have dismissed the respondent's suit in toto.

In this respect, I consider the learned trial judge erred when she held the two agreements to have been validly executed. Her conclusion was swayed by the fact that the appellants elected not to adduce any evidence at the close of the respondent's case and by that election she invoked s. 114(g) of Act 56 against them. This is how she expressed it.

> In this case since the Defendants did not call any witnesses to support their defence, to my mind they had not discharged their evidential burden of proof. In this circumstances to my mind, section 114(g) of the Evidence Act could also be invoked here.

Here again the learned trial judge fell into error as s. 114(g) has no relevance in these proceedings. Whilst it is correct to say that the appellants had to prove the allegation of illegality as pleaded by them, that became unnecessary when PW2 had, in no uncertain terms, in the course of his cross-examination, testified that by splitting the sale and purchase of the two properties into two agreements, the government had been unjustly deprived of large sums of

money by way of real property gains tax and stamp duty payable and this makes the agreements void. As such the appellants' election not to lead any evidence cannot be held against them as there is no procedural requirement in the Rules of the High Court 1980, that a defendant must lead evidence at the end of the plaintiff's case. Order 35 of the Rules that govern proceedings at a trial only sets out the order of speeches at r. 4(3) and (4) in situations where a defendant elects not to or to adduce evidence after evidence on behalf of the plaintiff has been given.

As an option, a defendant need only adduce evidence where he considers that the evidence led by a plaintiff has established the plaintiff's claim on a balance of probability. It is then incumbent upon the defendant to rebut the plaintiff's case, by calling evidence on his behalf. In this instance the appellants had taken the stand that at the end of the respondent's case, the latter had not proved his claims and coupled with PW2's evidence on the admission of evasion of the relevant revenue laws, the appellants considered no rebuttal was necessary and elected not to call any evidence on their behalf. This however should not be taken as the withholding of unfavourable evidence under s. 114(g) of Act 56.

As I have found the two agreements to be void and unenforceable, can the respondent seek restitution and revert to his *status quo* under the provisions of s. 66 of Act 136? That section reads as follows:

> 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, to make compensation for it, to the person from whom he received it.

The applicability of s. 66 was discussed at great length by the then Federal Court in *Ahmad bin Udoh & Anor v. Ng Aik Chong* [1970] 1 MLJ 82, a case that was also relied upon by the respondent. The facts of that case were that the respondent entered into an agreement with the appellants for the lease of padi land for a period of six years. Pursuant to the agreement, a sum of $1,500 was paid to the appellants, who subsequently refused to allow the respondent to till the land. In an action to recover the sum paid under the agreement, the Sessions Court gave judgment to the respondent. On appeal, the appellants raised a new issue not pleaded earlier that the agreement was illegal for contravening s. 3(1) of the Padi Cultivators Ordinance 1965 and the sum paid under the illegal agreement was not recoverable by the respondent. Wan Suleiman, J (as he then was, see [1969] 2 MLJ 116), in dismissing the appeal, held:

(1) that under s. 66 of the Contracts (Malay States) Ordinance 1950, (the predecessor of Act 136) all that need to be proved is that the illegal purpose has not been achieved and

(2) the agreement was one which came within the ambit of the words "if discovered to be void" in s. 66 and the respondent was therefore entitled to the refund of the money paid under the illegal agreement.

The matter proceeded to the Federal Court where Suffian, FJ (as he then was) held that for an agreement "discovered to be void" under s. 66, it includes an agreement that was void from its inception. His Lordship also held that on the facts there is no evidence that the respondent was in *pari delicto* and that he knew when he entered into the agreement that it was forbidden by law, the illegality of the agreement was discovered subsequent to the making of it, the claim for restoration of his money is not based on the illegal contract but dissociated from it and his action is not founded on dealings which are contaminated by illegality."

In yet another case of *Yeep Mooi v. Chu Chin Chua & Ors* [1981] 1 MLJ 14, the then Federal Court when dealing with s. 66 had this to say.

> An agreement "discovered to be void" does not mean that the contract is void on discovery or void because of discovery of illegality.
>
> It means what it says, in that the contract was *void ab initio* without the parties at the time being aware of the true legal position. It is only later that the contract is found to be void and so they became aware of its voidness. We are of the view therefore that s. 66 of the Contracts Act applies to this, and the appellant is entitled to the restitution of her money by the pawnshop which received an advantage from its use.

In *Yeep Mooi's* case, the appellant had deposited some money with a person who was carrying on a borrowing business and as he was not a public company or a licensed borrowing company, the transaction was illegal, void and unenforceable under s. 3 of the Borrowing Companies Act 1969 (the Act). The appellant did not know nor suspect that the deposit transaction contravened the Act. She placed her money on deposit in good faith and subsequently received interest from it. She only became concerned about the safety of her money when she learnt of the depositee's death and demanded a refund but was refused and she filed a suit against the estate. She only became aware that the transaction had contravened the Act when she received a copy of the statement of defence claiming that the transaction was void and unenforceable. It was under such circumstances that the appellant became entitled to the restitution of her deposit under s. 66 of Act 136.

The facts of *Ahmad bin Udoh* and *Yeep Mooi* are distinguishable from the facts of the instant appeal for unlike the agreements in *Ahmad bin Udoh's* case and *Yeep Mooi's* case, the two agreements now questioned by the appellants were drawn up by a common solicitor, PW2, whose main practice involved conveyancing work. The agreements in the two cases cited were prepared by the parties themselves and they did not have the benefit of proper legal advise.

There is evidence that PW2 discussed the workings of Acts 169 and 378 with both parties, and his evidence during his cross-examination appears as follows:

> I have been in practice as a lawyer for the past 11 years. The first couple of years I merely handled litigation work. For the last 6, 7 years I did mainly banking and conveyancing works. When I said conveyancing I meant landed properties transactions. I am fairly familiar with the Sales and Purchase Agreement of shares of companies.
>
> To some extent, I am familiar with the provisions of the Stamp Ordinance. I am familiar with certain relevant sections relating to landed properties.

Later when he was cross-examined on the meeting he had with the respondent and the first appellant on 11 January 1990, eight days before the two agreements were executed, PW2 stated as follows:

> On 11 January 1990, Mr. Ono and Mr Thong did discuss the Stamp Act and Real Property Gains Tax Act.

As their legal advisor, PW2 must know that executing the two agreements in the manner that was done must lead to less tax and less stamp duty payable to the government and this knowledge must be imputed to both his clients, the respondent and the appellants. In this respect, the respondent a non-English speaking foreigner had placed himself entirely in the hands of PW2. I treat the respondent to have had the necessary knowledge that executing the two agreements in the manner it was done had deprived the government of Malaysia of less tax and less stamp duty. See the case of *Dixon v. Winch* [1900] 1 Ch 736 that was followed in *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners)* [1989] 1 CLJ 458; [1989] 1 MLJ 261.

Under these circumstances both the respondent and appellants cannot say that they were not aware that their act in circumventing the guidelines had also contravened the relevant provisions of Acts 169 and 378 as well and it is this knowledge that distinguishes this appeal from that of the respondent in *Ahmad bin Udoh* and the appellant in *Yeep Mooi,* who were not aware at the time they entered into their respective agreements that they had contravened or suspected to have contravened any law. The facts of the instant appeal are

stronger as both the respondent and appellants were undoubtedly in *pari delicto* when they entered into the two agreements that were prepared by their common solicitor. This is definitely not the case where a contract is discovered to be void under s. 66 of Act 136 and for that very reason restitution could not be ordered. See the decision of this court in *Mustafa bin Osman v. Lee Chua & Anor supra*.

For the reasons appearing in this judgment, the appeal was allowed with costs here and below and the deposit refunded to the appellants. Consequential upon this, the titles of the two properties were also ordered to be returned to the appellants'solicitors. As the third appellant had withdrawn its counter claim, it was ordered to be dismissed with no order as to costs.

Mr Su, counsel for the appellants then referred us to the Mareva injunction obtained by the respondent on 26 July 1990, against the first and second appellants. This order was supplemented by another order consented to by the parties, dated 4 September, 1990. However on 9 October 1990, again with the consent of the parties, the Mareva injunction was set aside on terms contained in a written agreement to be executed by them. Resulting from the discharge of the Mareva injunction, Mr. Su then applied that damages be assessed together with interests and costs to be paid by the respondent. His request was allowed despite objections from Mr. Wong as the order of assessment could not have been made earlier in the court below as judgment had been entered against the appellants.

Ahmad Fairuz HMR:

Perayu-perayu pertama dan kedua adalah pemegang-pemegang berdaftar kesemua saham-saham perayu ketiga dan juga kesemua saham-saham sebuah syarikat bernama Windollars Sdn. Bhd. Melalui suatu perjanjian bertulis bertarikh 19 Januari 1990 antara perayu-perayu pertama dan kedua dengan responden, perayu-perayu pertama dan kedua menjualkan kesemua saham-saham mereka dengan Windollars Sdn. Bhd. kepada responden. Harga jualan itu ialah RM1,600,000. Perayu ketiga pula, melalui suatu perjanjian bertulis bertarikh 19 Januari 1990 juga, bersetuju untuk menjualkan dua keping tanahnya kepada responden. Harga jualannya ialah RM4,900,000. Perayu ketiga adalah tuanpunya berdaftar tanah-tanah tersebut.

Mengenai transaksi penjualan saham Windollars Sdn. Bhd., responden telah menjelaskan harga jualan saham-saham itu dan perayu-perayu pertama dan kedua telah menyerahkan kepada peguam-peguam responden kesemua saham-saham mereka bersama-sama dengan borang-borang pindahmilik dan kesemua buku-buku syarikat.

Berkenaan transaksi tanah pula, responden telah membayar sebanyak RM980,000 dan bakinya, iaitu RM3,920,000 akan dijelaskan dalam tempoh masa tiga bulan iaitu pada atau sebelum 18 April 1990. Bagaimanapun pada 12 Mac 1990, Golden Scoop Sdn. Bhd. telah memperolehi suatu injangsi menghalang perayu ketiga daripada menjual, melupus dan memindahmilik tanah-tanah berkenaan. Injangsi itu kemudiannya telah diketepikan oleh Mahkamah Tinggi. Kerana itu, Golden Scoop Sdn. Bhd. merayu ke Mahkamah Agong. Rayuannya dibenarkan dan perintah injangsi dipulihkan. Justeru itu, responden membatalkan kedua-dua perjanjian itu dan memfailkan writ di Mahkamah Tinggi Kuala Lumpur terhadap ketiga-tiga perayu. Mengikut writ dan penyata tuntutan terpindanya responden menuntut deklarasi bahawa beliau telah membatalkan dengan berkesannya kedua-dua perjanjian bertarikh 19 Januari 1990 itu. Secara alternatif responden memohon deklarasi bahawa perjanjian penjualan tanah itu adalah tak sah (void) dan kerana itu perjanjian penjualan saham itu hendaklah ditamatkan (determined). Responden juga menuntut supaya perayu-perayu pertama dan kedua membayar balik sejumlah RM2,721,024 yang telah dibayarnya di bawah kedua-dua perjanjian berkenaan dan sebagai tambahan atau alternatif responden menuntut supaya perayu ketiga membayar balik sejumlah RM1,121,024 yang telah dibayarnya di bawah perjanjian jualbeli tanah itu. Responden juga menuntut gantirugi, faedah dan kos.

Pembelaan terpinda (yang kedua) perayu-perayu, antara lainnya, menyatakan bahawa perayu ketiga bersedia pada masa-masa yang material untuk menyerahkan kepada responden tanah-tanah berkenaan bebas daripada bebanan-bebanan (encumbrances) dan dengan milikan kosong. Tindakan responden membatalkan perjanjian-perjanjian itu menunjukkan responden yang tidak bersedia menjelaskan baki harga jualan tanah-tanah itu. Dan penjelasan baki itu adalah satu terma yang nyata atau tersirat dalam perjanjian penjualan tanah itu. Perayu-perayu pertama dan kedua pula menyatakan bahawa perjanjian penjualan saham itu telah dilaksanakan sepenuhnya sebelum perintah injangsi dikeluarkan. Lagi pula, saham-saham itu telah didaftarkan atas nama responden. Oleh itu responden tidaklah boleh membatalkan perjanjian itu. Juga dikatakan oleh perayu-perayu bahawa perjanjian-perjanjian berkenaan adalah bertentangan dengan dasar awam dan menyalahi undang-undang. Kerana demikian, perjanjian-perjanjian itu adalah batal, tak sah dan tidak boleh dikuatkuasakan.

Di akhir perbicaraan, Mahkamah Tinggi telah memberi penghakiman kepada responden. Perayu-perayu kini merayu terhadap keputusan Mahkamah Tinggi itu.

Perkara pokok yang diperdebatkan oleh kedua-dua pihak dalam rayuan ini ialah mengenai perjanjian-perjanjian itu menyalahi undang-undang. Dikatakan oleh perayu-perayu bahawa kerana perjanjian-perjanjian itu menyalahi undang-undang maka mahkamah tidak wajar menjadi pihak kepada penguatkuasaan perjanjian-perjanjian itu. Pihak responden pula menghujjahkan bahawa perjanjian-perjanjian itu tidak menyalahi undang-undang.

Responden, dalam keterangannya, menyatakan bahawa tujuan kedatangannya ke Malaysia pada 7 Januari 1990 ialah untuk membeli tanah di Kuala Lumpur. Responden berhasrat membina bangunan pejabat di atas tanah itu. Dia juga berhasrat memindahkan ibupejabatnya di Jepun ke Kuala Lumpur. Lantas, responden mengenalpastikan tanah-tanah berkenaan untuk dibelinya. Selepas perundingan, harga tanah-tanah itu ditetapkan pada RM6.5 juta. Untuk maksud membeli tanah-tanah itu responden telah mengambil perkhidmatan seorang peguam, iaitu PW2. Keterangan responden selanjutnya menunjukkan bahawa kelulusan Jawatankuasa Pelaburan Asing (Foreign Investment Committee) adalah diperlukan sebelum tanah-tanah itu boleh dibelinya. Ini adalah kerana harga tanah-tanah itu melebihi RM5 juta. Bagi mengatasi keperluan memohon kelulusan Jawatankuasa Pelaburan Asing responden mewujudkan kedua-dua perjanjian tersebut di atas. Keterangan-keterangan ini semua, kata peguam pihak responden, menunjukkan bahawa tujuan utama pihak responden ialah untuk mengelak dari mematuhi tuntutan garispanduan (guidelines) Jawatankuasa Pelaburan Asing. Responden tidak berhasrat untuk melanggari sebarang undang-undang atau statut.

Mengenai hujjah peguam responden itu, peguam pihak perayu-perayu menghujjahkan bahawa keterangan-keterangan peguam responden ketika itu – iaitu PW2 – hendaklah diambilkira bersama dengan keterangan-keterangan responden. Adalah ketara bahawa PW2 mengakui bahawa kedua-dua perjanjian berkenaan adalah bertujuan untuk mengelak dari keperluan mendapat kelulusan Jawatankuasa Pelaburan Asing. PW2 seterusnya mengakui bahawa balasan (consideration) sebanyak RM1.6 juta dalam perjanjian pembelian saham-saham Windollars Sdn. Bhd. adalah sebenarnya balasan bagi pembelian tanah-tanah berkenaan. Mengikut PW2, jika RM1.6 juta itu dikira sebagai balasan bagi pembelian tanah-tanah itu, maka cukai setem yang perlu dibayar ialah RM32,000.

Kerana RM1.6 juta itu ditunjukkan sebagai balasan bagi pembelian saham-saham, maka cukai setem yang dikenakan ialah RM4,800. Oleh demikian PW2 akui bahawa Kerajaan Malaysia telah rugi sebanyak RM27,200 bagi cukai setem. Nyatalah bahawa apa yang responden telah lakukan adalah suatu pelarian (evasion) dari membayar cukai yang lebih tinggi. PW2 mengetahui mengenai pelarian ini. Dan responden sendiri telah menyerahkan hal transaksi

pembelian tanah ini kepada PW2. Responden menyatakan bahawa beliau mempercayai (trusted) PW2 sepenuhnya. Responden bergantung sepenuhnya (depended totally) kepada PW2 – apatah lagi PW2 adalah peguamnya. Dalam keadaan-keadaan demikian pengetahuan PW2 mengenai pelarian cukai itu hendaklah dikaitkan (imputed) kepada responden. (*Dixon v. Winch* [1900] 1 Ch. 736 yang diikuti oleh *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor. (Goh Ah Chwee & Anor, Interveners)* [1989] 1 MLJ 261 adalah berkenaan). Justeru itu responden mengetahui bahawa kedua-dua perjanjian itu adalah suatu tindakan melarikan diri daripada membayar cukai yang lebih tinggi dan yang sepatutnya dijelaskan kepada kerajaan. Tindakan responden ini adalah ketara bertentangan dengan dasar awam (public policy). Dan mengikut s. 24(e) Akta Kontrak 1950, balasan-balasan dalam perjanjian-perjanjian itu adalah menyalahi undang-undang (unlawful). Dan kerana itu perjanjian-perjanjian itu adalah tak sah (void). Seksyen 24(e) Akta Kontrak itu berbunyi:

> The consideration or object of an agreement is lawful, unless -
>
> ...
>
> ...
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Kerana perjanjian-perjanjian itu tak sah maka perjanjian-perjanjian itu tidaklah boleh dikuatkuasakan (unenforceable). (*Harun b. Taib v. Khor Peng Song* [1991] 3 CLJ 2484 adalah berkenaan). Malahan apa yang telah dilakukan oleh kesemua pihak dalam perjanjian-perjanjian itu telah membawa kesan (effect) yang mengecewakan (defeat) undang-undang hasil (revenue laws) dan mengelirukan (misleading) hasil (revenue). Kerana itu perjanjian-perjanjian itu tidak boleh dikuatkuasakan. (*CB-Trak Sdn. Bhd. v. Bingkal Timber Agencies Sdn. Bhd.* [1989] 1 MLJ 124 adalah berkenaan). Dan mahkamah tidak boleh dengan disedarinya (knowingly) menjadi pihak kepada penguatkuasaan sesuatu perjanjian yang tak sah (*Keng Soon Finance Bhd. v. M.K Retnam Holdings Sdn. Bhd. & Anor.* [1980] 1 MLJ 457 di ms 461 adalah berkenaan).

Dihujjahkan juga bahawa pihak responden sebenarnya tidak mengetahui mengenai keharaman (illegality) perjanjian-perjanjian itu. Dalam hal ini, pihak perayu-perayu telah mengutarakan kes *Miller v. Karlinski* [1945] (62) TLR, 85 yang dengan jelasnya menunjukkan bahawa ketiadapengetahuan mengenai keharaman perjanjian-perjanjian itu tidak akan menyebabkan mahkamah

menguatkuasakan perjanjian-perjanjian itu. Justeru itu perjanjian-perjanjian itu masih tetap tidak akan dikuatkuasakan oleh mahkamah walaupun ada pihak kepada perjanjian-perjanjian itu mencabuli terma-termanya.

Berasaskan pada rasional yang dihuraikan di atas, saya membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi. Oleh kerana perayu-perayu telah menarik balik tuntutanbalas mereka maka tuntutanbalas perayu-perayu adalah dibatalkan tanpa kos. Saya juga mengarahkan gantirugi berkenaan injangsi dan faedah atas gantirugi itu ditaksirkan oleh Pendaftar Mahkamah Tinggi dan kos taksiran itu hendaklah ditanggung oleh responden. Dan atas permintaan perayu-perayu, saya mengarahkan kedua-dua hakmilik (titles) yang didepositkan sebagai jaminan (security) dipulangkan.